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Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

CASE NO. 90-1928

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANTOINETTE RUSSO and MILDRED MALONEY,
Petitioners,

vs.

CARL MASSULLO, BEAVER TOWNSHIP, JOHN DOE 1-7, SCOTT POHLMAN, CARL FROST, RICH MARTIN and KEN FROST,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an injunction issued by an intermediary state court create a ministerial duty sufficient to deprive law enforcement officials of their qualified immunity to a 42 U.S.C. §1983 action if the injunction does not form the basis for the federal cause of action?

2. Is the reasonableness of a search and seizure a relevant inquiry in determining whether a law enforcement official is entitled to qualified immunity in a 42 U.S.C. §1983 action?

PARTIES TO THE PROCEEDING

Petitioners

1. Antoinette Russo, the owner of the Stagecoach Restaurant and Lounge located in Beaver Township, Ohio.

2. Mildred Maloney, a former employee at the Stagecoach Restaurant and Lounge.

Respondents

1. Scott Pohlman, in his individual capacity as a state liquor control agent.

2. Carl Massullo, individually and in his official capacity as acting chief of the Beaver Township police department.

3. Carl Frost, individually and in his official capacity as a police officer with the Beaver Township police department.

4. Rick Martin, individually and in his official capacity as a police officer with the Beaver Township police department.

5. Ken Frost, individually and in his official capacity as a police officer with the Beaver Township police department.

6. John Does 1-7, individually and in their official capacity.

7. Beaver Tonwhip, a political subdivision in Mahoning County, Ohio.

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STATEMENT OF THE CASE

On April 16, 1987, Petitioners Antoinette Russo ("Russo") and Mildred Maloney ("Maloney") filed companion complaints pursuant to 42 U.S.C. §1983 against Respondents Beaver Township, various members of the Beaver Township police force and Scott Pohlman ("Pohlman"), an investigator for the Ohio Department of Liquor Control ("ODLC"). The complaints alleged violations of Petitioners' rights under the fourth, fifth, ninth and fourteenth amendments to the United States Constitution. Petitioners' complaints revolve around an inspection of the Stagecoach Restaurant and Lounge ("Stagecoach") conducted pursuant ot Ohio Rev. Code Ann. 4301.10(A)(6). This inspection was conducted at the culmination of an investigation by the ODLC which has authority to enforce the liquor laws of the State of Ohio. Ohio Rev. Code Ann. 4301.10(A)(4).

Respondent Pohlman's involvement in the investigation was a result of a request to ODLC by Respondent Massullo, Chief of the Beaver Township police force, for assistance in investigating illegal gambling activity at the Stagecoach. During Pohlman's investigation, which spanned the month of March 1987, he observed two video draw poker machines in operation at the Stagecoach.

Video draw poker machines are video games that simulate the game of poker. When a player receives a winning hand, the machine credits the player with points. If the player reaches a certain number of points or accumulates a certain number of credits, the player receives cash or some other reward from the liquor establishment. This is known as giving or receiving a "pay-off". Pohlman observed Petitioner Maloney, then employed as a cook for the Stagecoach, making payoffs and he received such a payoff himself.

Pohlman reported his findings regarding the Stagecoach to his superior and a meeting took place to coordinate enforcement efforts of the ODLC with the Beaver Township police force. It was determined that ODLC investigators would close the investigation by conducting a raid of the subject liquor establishments. The raid consisted of entering a series of establishments, including the Stagecoach, inspecting the premises, issuing violation notices to the permit holder, seizing evidence of gambling violations and confiscating the video drawpoker machines. The Beaver Township police force agreed to participate in the raid, providing armed officers to protect the ODLC investigators when they entered the Stagecoach.

On April 16, 1987, at 9:30 p.m., two agents of ODLC named Steven Hasseman and Curtis Hundley, accompanied by armed Beaver Township police officers and plain clothes

United States Internal Revenue agents, entered the Stagecoach. Initially, to insure their own safety, one or more of the agents inspected the premises for concealed weapons and conducted pat down searches of some customers. Respondent Pohlman arrived at the Stagecoach at approximately 10:30 p.m. to check on the progress of Hasseman and Hundley. He stayed approximately fifteen to thirty minutes. During this time Pohlman did not pat down, search or point a gun at the Petitioners. By 11:20, the investigation was complete and the agents and officers left the Stagecoach.

During the course of the evening, Petitioners were questioned about the ownership of the draw poker machines. Petitioner Russo refused to answer any questions until her attorney was present. It was later learned that Russo leased the machines from Garono Vending Company ("Garono") and that Garono, in a separate

case, had obtained an injunction from the Mahoning County Court of Common Pleas enjoining seizure of poker machines owned, leased or operated by Garono.

On April 22, 1987, Pohlman presented his facts to the prosecutor's office and signed as complaining witness against Petitioners. Petitioners were charged with gambling and operation of a gambling house. These cases were subsequently dismissed by the Canfield, Ohio, Municipal Court.

Petitioners filed complaints in the United States District Court for the Northern District of Ohio, Eastern Division on April 14, 1988. On October 17, 1988, Petitioners filed amended complaints asserting their cause of action under 42 U.S.C. §1983. All Defendants moved for summary judgment. The District Court for the Northern District of Ohio granted these motions on the basis that the Defendants were entitled to qualified immunity on the

§1983 claims because they acted reasonably in light of the clearly established law at the time of the incident. (App. p. B-14-16). The pendent State claims were also dismissed. (App. p. B-16-17).

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit in an unpublished per curiam opinion affirmed summary judgment as to all federal claims against Beaver Township as well as the federal claims against the members of the Beaver Township police force regarding seizure and arrest. (App. p. A-15-16). Summary judgment was reversed with regard to the claims against the Beaver Township police force for unreasonable search of the Petitioners and the premises. (App. p. A-16-17). In addition, summary judgment granting qualified immunity for Respondent Pohlman was reversed on the grounds that there existed a question of fact as to whether Pohlman's statements that

he witnessed and received payoffs were made falsely or with reckless disregard for their truth. (App. p. A-14). Finally, the Lower Court reversed dismissal of the pendent claims to the extent that federal claims existed to support pendent jurisdiction. (App. p. A-16). The case was remanded for further proceedings.

Petitioners' petition for writ of certiorari was docketed with this Court on June 13, 1991.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides the basic criteria for determining whether a case warrants the issuance of a writ of certiorari:

* * *

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case does not satisfy any of these criteria.

Respondent does not believe that Petitioners have raised an issue warranting the Court's plenary review. Nevertheless, a conditional cross-appeal has been filed to permit Respondent to present to the Court, if certiorari is granted, those portions of the Sixth Circuit's opinion reversing the District Court on the issue of Respondent Pohlman's qualified immunity.

I. THIS CASE DOES NOT WARRANT EXERICSE OF THIS COURT'S JURISDICTION SINCE THE DUTY AT ISSUE IS DISCRETIONARY AND THIS CASE DOES NOT CONFLICT WITH PRECEDENT REGARDING THE NARROW MINISTERIAL EXCEPTION TO QUALIFIED IMMUNITY

Petitioners maintain that a significant conflict has developed between the United States courts of appeals on the issue of whether a government official acting in violation of a ministerial duty is entitled to qualified immunity as a defense to a 42 U.S.C. §1983 action. It is Petitioners' contention that the instant case aligns the Sixth Circuit with the Fourth, Seventh and

Eighth Circuits in granting qualified immunity in a §1983 action to a government official who violates a clear ministerial duty. Petitioners' contention is incorrect not only because Respondents' actions were discretionary but also because the circuits have been consistent in analyzing the criteria for qualified immunity.

A. The Duty At Issue In This Case Is Discretionary.

The challenged activity at issue in the case at bar involved a decision to conduct a warrantless administrative search of a liquor establishment and to seize illegal draw poker machines found therein. While neither of the courts below addressed the issue of the nature of this function, the raid was clearly not conducted pursuant to any law of sufficient specificity to create a ministerial duty. See Davis v. Scherer, 468 U.S. 183 (1984).

In Davis, this Court ruled that an official sued for a constitional violation does not lose qualified immunity merely because his conduct violates a state regulation. 468 U.S. at 193. The Court reasoned that to hold otherwise would require officials to assess whether the intent of a particular regulation or statute was to protect a constitional right. Id. This intent inquiry would return the qualified immunity analysis to pre-Harlow v. Fitzgerald, 457 U.S. 800 (1982), subjective inquiries, thus preventing resolution on summary judgment, a result that the Court concluded would "disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." 468 U.S. at 195.

It was argued in Davis that the regulation created a ministerial duty and

the official should therefore be denied qualified immunity since Harlow provides immunity for the exercise of discretionary functions. The Court delineated the scope of its "ministerial duty" exception to qualified immunity as being limited to circumstances where the law or regulation specified the "precise action that the official must take in each instance" and the breach thereof gave rise to the cause of action for damages. 468 U.S. at 196 n.14.

Respondents' challenged actions were taken pursuant to Ohio Rev. Code Ann. §4301.10 which provides, in pertinent part:

> (A) The department of liquor control shall:
>
> * * *
>
> (4) Enforce Chapters 4301. and 4303. of the Revised Code, and the rules and orders of the board, the director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors; ...
>
> * * *

> (6) Inspect, upon demand, the books, accounts, records, memeorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code...
>
> (7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, ...

The duties imposed by this statute can only be deemed discretionary.

Since no court has suggested that the duty at issue in the instant case is ministerial, Petitioners' contention that the officers were accorded qualified immunity for actions taken in violation of a ministerial duty is in error. Furthermore, since the duty at issue is so clearly discretionary, granting Respondents qualified immunity is consistent with established qualified immunity precedent of the United States courts of appeals.

B. This Case Presents No Conflict In The Circuit Courts Of Appeals

Petitioners contend that Withers v. Levine, 615 F. 2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980); Coleman v. Frantz, 754 F. 2d 719 (7th Cir. 1985); McIntosh v. Weinberger, 810 F. 2d 1411 (8th Cir. 1987), vacated, sub nom. Turner v. McIntosh, 487 U.S. 1212 (1988), cert. denied, sub nom. McIntosh v. Carlucci, 487 U.S. 1217 (1988); and the instant case inappropriately grant qualified immunity to an official acting in violation of a ministerial duty. Petitioners' Brief at 19. Petitioners maintain that these cases conflict with decisions in the First, Third, Fifth, Ninth and Eleventh Circuits which recognize a distinction between discretionary and ministerial functions, finding that a governmental official is entitled to qualified immunity only if engaged in a discretionary function rather

than a ministerial duty when the alleged violation of a federal right occurs. Id. Petitioners cite in support of this proposition, Fonte v. Collins, 898 F. 2d 284 (1st Cir. 1990); People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F. 2d 139 (3d Cir. 1984); Gagne v. City of Galveston, 805 F. 2d 558 (5th Cir. 1986), cert. denied, Gagne v. Putnal, 483 U.S. 1021 (1987); Trotter, Inc. v. Watkins, 869 F. 2d 1312 (9th Cir. 1989); Harrel v. United States, 875 F. 2d 828 (11th Cir. 1989). Id. at 19-20.

Petitioners argue that public policy demands that the "conflict" be resolved by an explicit holding that a governmental official who violates a clear ministerial duty forfeits any claim to qualified immunity. However, this Court already directly addressed this issue in Davis v. Scherer, wherein it was specifically recognized that a narrow ministerial duty

exception to qualified immunity exists. 468 U.S. at 196 n. 14.

Davis made clear that the standard announced by the Court in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), which provides that "government officials performing discretionary functions generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known", contemplated a narrow ministerial duty exception to official qualified immunity. Any ambiguity about the existence of this exception that may have existed after Harlow was removed by this Court's statement in Davis that, "this Court's doctrine grants qualified immunity to officials in the performance of discretionary, but not ministerial, functions." Davis, 468 U.S. at 196 n. 14.

Davis made clear two important

limitations on the circumstances under which violation of a ministerial duty will deprive an official of qualified immunity. First, an official who violates a ministerial duty and who at the same time violates an individuals constitutional or statutory rights will be deprived of the qualified immunity defense only if the ministerial duty breach actually gives rise to the cause of action. Id. Petitioners mistakenly label an intermediary state court injunction, as a source of law creating a ministerial duty. Violation of the injunction against seizing Garono-owned machines does not give rise to a §1983 claim. The remedy for breach of this state court injunction is contempt, not an action under 42 U.S.C. §1983. In addition under Harlow, it is "clearly established statutory or constitutional rights" that an official must not violate to still enjoy qualified immunity. The Sixth Circuit looks to

decisions of this Court, the Sixth Circuit or the state's highest court to determine clearly established law. See Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 ("to find clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself... a mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit"). See also Poe v. Haydon, 853 F.2d 418, 424 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989); Robinson v. Bibb; 840 F.2d 349, 351 (6th Cir. 1988); Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir. 1988); Davis v. Holly, 835 F.2d 1175, 1180 (6th Cir. 1987).

The earliest case Petitioners cite as according qualified immunity to an official in the exercise of a ministerial function is Withers v. Levine, 615 F.d 158 (4th Cir.

1980). Just as in the case at bar, in Withers the court made no determination that the duty at issue was a ministerial function. Moreover, Withers predated Harlow. It was decided under the former two-prong test for qualified immunity set forth in Procunier v. Navarette, 434 U.S. 555 (1978) and Wood v. Strickland, 420 U.S. 308 (1975) which encompassed a subjective as well as an objective component. Withers, 615 F. 2d at 162-63. This Court has since rejected the subjective prong of the qualified immunity test, focusing instead on the objective reasonableness of the challenged action. Anderson v. Creighton, 483 U.S. 635, 639-40 (1987); Davis v. Scherer, 468 U.S. 183, 193-95 (1984); Mitchell v. Forsyth 472 U.S. 511, 530 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982).

The Fourth Circuit's only mention of a ministerial duty in Withers is in the

context of pointing out that the focus of the good faith qualified immunity inquiry was on whether the official had reason to believe he was violating a constitutional right, not on a distinction between ministerial and discretionary actions. 615 F.2d at 163. It is clear from the facts of Withers that if decided today under the contours of this Court's decision in Davis which classifies as discretionary all laws except those that "specify the precise action that the official must take in each instance", the official duty at issue would be determined discretionary. 468 U.S. at 196 n. 14. Withers involved an action for damages based on the sexual assault of a prisoner. Plaintiff maintained that his constitutional right to be free from cruel and unusual punishment was violated by the prison official who assigned him to a cell with a known violent sex offender. The prison had no effective procedure for

assigning prisoners to cells. The function was completely discretionary. Withers therefore is not a case where an official was extended qualified immunity while engaged in a ministerial function as Petitioners maintain and presents no conflict with Davis or the instant case.

Coleman v. Frantz, 754 F. 2d 719 (7th Cir. 1985), decided under the Harlow standard of qualified immunity, is also cited by Petitioners as according qualified immunity to an official acting in violation of a ministerial duty. Petitioners' Brief at 19. Coleman involved a suit for damages against a county sheriff for failure to promptly bring the plaintiff before a magistrate. In essence, the Seventh Circuit Court of Appeals determined that the duty was not ministerial stating, "it cannot be said that there was an adequately defined duty upon him to undertake formally the futile act of attempting to bring Coleman to

the Wells Circuit Court." 754 F.2d at 728 (citation omitted). This analysis comports with the Davis classification of discretionary acts as all but those laws which "specify the precise action that the official must take in each instance..." 468 U.S. at 196 n. 14.

Petitioners' final citation which purportedly evidences an inconsistency among the circuits is McIntosh v. Weinberg, 810 F.2d 1411 (8th Cir. 1987), vacated, sub nom. Turner v. McIntosh, 487 U.S. 1212 (1988), cert. denied, sub nom. McIntosh v. Carlucci, 487 U.S. 1217 (1988). Petitioners' brief does not reflect that McIntosh was vacated by this Court. Therefore Petitioners' reliance on McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987), is misplaced.

In the instant case Petitioners mistake the scope of the ministerial exception, as did the appellee's in Davis.

> Appellee's contention mistakes the scope of the "ministerial duty" exception to qualified immunity in two respects. First, as we have discussed, breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the appellee's cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties. Even if the personnel regulation did create a ministerial duty, appellee makes no claim that he is entitled to damages simply because the regulation was violated.

468 U.S. at 196 n. 14. Petitioners herein claim that an intermediary state court injunction, in an unrelated case, enjoining seizure of Garono-owned video machines, created a ministerial duty. The injunction, however, can not be said to give rise to a cause of action for violation of federal constitutional or statutory rights. Therefore it is irrelevant whether the injunction created a ministerial duty.

II. THE REASONABLENESS OF A SEARCH UNDER THE FOURTH AMENDMENT IS NOT A RELEVANT INQUIRY IN EXAMINATION OF A QUALIFIED IMMUNITY DEFENSE.

The conflict perceived by Petitioners between the instant case and Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986)(en banc), aff'd, 485 U.S. 264 (1988), is likewise irrelevant. Petitioners argue that Bissonette requires looking to state law to determine the reasonableness of a warrantless search. Petitioners' Brief at 39-40. However, the determination of the reasonableness of a search had no relationship to the issue of qualified immunty in Bissonette nor does it have any relevance to determining the Respondents' immunity to suit in this case.

Bissonette involved a motion to dismiss for failure to state a claim. The question before the Eighth Circuit was whether the plaintiff-residents of Pine Ridge Indian Reservation had stated a claim under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), for a violation of the fourth amendment. Qualified immunity in a

Bivens action is coextensive with qualified immunity in a 42 U.S.C. §1983 action. See Butz v. Economou, 483 U.S. 478, 500-01 (1978). The Eighth Circuit in Bissonette made specific reference to the fact that the defendants had not yet answered or plead qualified immunity. The issue of whether the defendant-army officers were entitled to qualified immunity was not before the court but the court nonetheless acknowledged, "[t]here may be a qualified immunity defense here." 800 F.2d at 813.

The inquiry for purposes of qualified immunity in a fourth amendment case is not whether the official conducted an unreasonable search and seizure. This inquiry relates only to the underlying claim of a violation of the United States Constitution. The question for purposes of qualified immunity is a purely legal

question of whether the official's conduct violates clearly established statutory or constitional rights of which a reasonable person would have known. Since Bissonette did not concern qualified immunity it does not conflict with the instant case so as to warrant this Court's review.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 18, 1991